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No. 608

In the Supreme Court of the United States

OCTOBER TERM, 1959

L. T. MONTFORD, A. Z. HANDFORD AND J. C. HAMILTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 103-104; Pet. App. 16) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 23, 1959 (R. 105). The petition for a writ of certiorari was filed on December 23, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the closing argument of government counsel constituted reversible error.

STATEMENT

Following a trial by jury, petitioners Montford and Handford were convicted on all six counts of an indictment charging them with federal alcohol violations. Petitioner Hamilton was charged and convicted of only the last three counts (R. 2-4, 6). Petitioners Montford and Handford were each sentenced to terms of imprisonment of three years; petitioner Hamilton, to 18 months (R. 7). On appeal, the judgments of conviction were affirmed (R. 105).

At the beginning of the trial, the possible government witnesses—including Mr. Gray of the State Beverage Department, Tampa, Florida, and federal alcohol agent Scott with whom Gray was cooperating in an investigation of violations of the alcohol revenue laws in northern Florida—were sworn and sequestered (R. 10, 12, 14, 56).[1]

1. The evidence actually adduced at the trial consisted entirely of the testimony of Mr. Gray. His testimony may be summarized as follows:

Mr. Gray first met petitioner Montford on March 14, 1958 (R. 13). On the afternoon of March 28, while Gray and agent Scott were having coffee at a cafe, petitioner Montford came in and sat down with them. He told them that he had heard that they were in the "moonshine business" and that he could

[1] Both Gray and Scott were acting in an undercover capacity (R. 14).

sell them some moonshine. Arrangements were then made by Montford to sell 75 gallons to the investigators to be delivered to them at Bainbridge, Georgia, at 9 p.m. that evening.

Montford met the investigators at 9 p.m. in Bainbridge and told them to follow him to "A. Z.'s place" [petitioner Handford's cafe] nearby. Sometime later, petitioner Handford arrived in his car. After all the parties were introduced, Handford asked if it would be all right for him to use the Ford truck (which was owned by the government and used by the investigators in their work) to load the whiskey. The investigators agreed. Handford told the agents and Montford to meet him at a particular park on Route 84 and then left in the truck. (R. 14-17.) The remaining three men drove to the designated park in Montford's car. Handford arrived with the truck loaded with whiskey. Investigator Scott paid Montford $345.00 for 15 cans of the whiskey, which bore no federal revenue stamps. (R. 18-19.) Gray and Scott drove the truck to Donalsonville, Georgia, where they met other state and federal investigators and destroyed all but five gallons of the whiskey (R. 19-20).

On April 2, 1958, Gray and Scott again met petitioner Montford and followed him as arranged to "A. Z.'s place." There they met Handford and petitioner Hamilton standing in the yard. Handford said that "he wouldn't be able to get the load" but that Hamilton would get it. When Hamilton returned with the moonshine, Mr. Scott paid Montford $345.00. (R. 20-24.)

2(a): In their closing arguments, counsel made the following arguments to the jury:

Mr. Douglas [defense counsel for petitioners Montford and Hamilton] (R. 61-62):

* * * * *

* * * You haven't been given the opportunity or privilege to hear from all of the persons who this witness said knew as much about the transactions as he did. You haven't heard from Mr. Scott, the United States Government agent, as to what happened, or didn't happen at the time that this beverage agent from Florida testified about. As to what Mr. Scott would have said or not have said, we are at an absolute and complete loss.

I have always been of the opinion that when a jury decide a case, and especially before they return a verdict of guilty that could bring imprisonment in the federal penitentiary to a citizen of the United States, that the jury should have before them the benefit of every person that knew anything about the transactions charged in the indictment.

This morning there was a string of witnesses sworn in behalf of the government, and the government saw fit only to put one witness on the stand, and this is a federal Court and that witness was not at the time of the transactions that he talked about, or even now, a federal agent, but an undercover agent in the beverage department of the state of Florida.

Now, Gentlemen of the Jury, how are you going to return a verdict beyond every reasonable doubt, that you know to be true, when you haven't heard from all of the parties that were

supposed to know about the transactions charged in the indictment?

I say that that fact alone, Gentlemen of the Jury, is sufficient for you to stop and think seriously. And I think that fact alone—the lack of evidence that the government could have produced here—we don't know why it wasn't produced, but certainly it could have been produced. Mr. Scott was right here in this Court room this morning and his name was called as a witness for the government, and how can you be expected to return a verdict of guilty that could send a citizen to prison when maybe, if Mr. Scott had been put on the stand, it would have caused you to turn him loose.

* * * *

Mr. Altman [also defense counsel for petitioners Montford and Hamilton] (R. 63-65):

* * * *

I say to you, as the government—as has already been said by Mr. Douglas—parades before you six or seven witnesses, places them in the room and then, after the show is over, brings them back into the Court room and sits them down for you to look at, without having given you an opportunity to listen to them, just is a further lapse of the principle of undercover agents and entrapments, which is far beyond our concept of legal jurisprudence and the right to a reasonable and fair trial in this or any other case. It is a matter of fair play, if it wasn't a matter of affirmative legal principle.

* * * *

> * * * let them [the government] carry the burden of proof and offer the evidence, not the testimony of one particular witness and rest there, when they have an opportunity to give you all of the facts.
>
> * * * *

Mr. Custer, defense counsel for petitioner Handford, made similar remarks (R. 65).

Government counsel argued (R. 68-69):

> * * * *
>
> It is true that we subpoenaed all of them that we brought in here and swore this morning when we started trying this case. We brought them up here. It is true and we only used one of them. It is true also, Gentlemen of the Jury and Ladies of the Jury, that we have to try our cases as, in our judgment, we think best, keeping in mind a lot of factors. We don't have to keep putting up cumulative testimony if we think it will be merely cumulative. We don't have to spend and exhaust the financial end of the treasury by keeping people here day after day.
>
> * * * *
>
> And I would remind you of this, and I am sure the defense lawyers are well aware that the rules of criminal procedure make available to every defendant the processes of this Court, not just to the government. The processes of this Court are available to these defendants, and had they wanted one of these witnesses, right there they sit for them.

(b). Subsequently, during the government counsel's argument the following colloquy occurred (R. 71-72):

Mr. Fowler [government counsel]:

* * * I have never seen evidence that was more clear in my life about a violation of the internal revenue laws.

Mr. Custer [defense counsel]:

Now, Your Honor, I am going to object to that. Counsel is testifying and comparing this with his previous experience. That is improper argument for government counsel to compare this with the other cases that he has tried, and I object to it and move Your Honor for a mistrial on that ground.

The Court:

Perhaps counsel goes a little bit too far there. Let's not argue about what you have seen. You may argue your inferences from this evidence, whether it is weak or strong in your opinion, and you may argue that as fully and completely as you want to, but about what you have seen, let's leave that out.

Mr. Fowler:

I apologize to the Court and to the jury for that improper statement.

The Court:

Very well.

In its instructions to the jury, the court stated that "[y]ou, of course, will arrive at your verdict wholly, entirely and exclusively on the basis of the evidence which you have heard in this Court during this trial" (R. 74). The court also added that the testimony of one witness can be enough (R. 79).

After a conference with the trial judge concerning these instructions, defense counsel agreed that they were sufficient (R. 80-82).

ARGUMENT

1. Government counsel may properly make statements in response to argument of opposing counsel which he could not ordinarily make in the first instance. Cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 241-242; *Crumpton* v. *United States*, 138 U.S. 361, 364; *Himmelfarb* v. *United States*, 175 F. 2d 924, 951 (C.A. 9), certiorari denied, 338 U.S. 860. When defense counsel argued that the jury should draw an unfavorable inference from the government's failure to call other witnesses (*supra*, pp. 4-6), government counsel could properly account for its alleged failure. See 2 Wigmore, *Evidence* (3d ed., 1940), § 290(3). Thus, in light of defense counsel's argument, government counsel could explain that the government did not desire to, and was not required to, submit evidence which was merely cumulative (see *id.* at § 287) and, similarly, could state that the witnesses were readily available for the defense to call (see *supra*, p. 6). See *United States* v. *La Rocca*, 224 F. 2d 859, 861 (C.A. 2), and *Paglia* v. *United States*, 243 F. 2d 437, 441 (C.A. 5), holding that, where a witness is equally available to both sides, a defendant is not entitled to have the trial court instruct the jury that the failure of the government to call a witness justifies the inference that his testimony would be unfavorable to the prosecution; and see *Ferrari* v. *United States*, 244 F. 2d 132, 141-142

(C.A. 9), certiorari denied *sub nom. Darneille* v. *United States*, 355 U.S. 873, and *Thomas* v. *United States*, 158 F. 2d 97, 99 (C.A. D.C.), certiorari denied, 331 U.S. 822, holding that it is not error for the government to fail to put a witness on the stand who is not necessary to its case because he might have given evidence favorable to the defendant.

2. Petitioner contends (Pet. 12-14) that the trial court erred in refusing to declare a mistrial after government counsel stated, in his argument to the jury, that he had never seen a more clear violation of the law (*supra*, pp. 6-7). The judge, however, immediately told the jury that he thought that the statement went "a bit too far" and government counsel apologized to the jury as well as to the court for his "improper statement." In its instructions to the jury, the court correctly stated that it was up to the jury to decide whether the government had established its case "solely" on the basis of the evidence. Petitioners agreed to all of the instructions (*supra*, p. 7), and the jury, on ample evidence, found petitioners guilty.

Even if counsel's statement was in fact improper, the trial court properly exercised its discretion, in the circumstances of this case, in refusing either to declare a mistrial or to set aside the verdict (R. 71-72, 89-90, 92). See *D'Aquino* v. *United States*, 192 F. 2d 338, 367 (C.A. 9), certiorari denied, 343 U.S. 935; *United States* v. *Cohen*, 177 F. 2d 523, 527-528 (C.A. 2), certiorari denied, 339 U.S. 914. In view of the explicit apology by counsel, the instructions given by the court, the failure of defense counsel to

ask for additional clarifying instructions (if he thought such were needed) and the clear evidence of guilt, petitioner was not prejudiced by this single statement. There is thus no occasion for further review by this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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